

D.T.E. 99-87

A Complaint and Request for Hearing of NEVD of Massachusetts, LLC against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts Pursuant to G.L.c. 166, § 25A

ORDER OF DISMISSAL

APPEARANCES: Alan D. Mandl, Esq.

Ottenberg, Dunkless, Mandl & Mandl LLP

260 Franklin Street

Boston, Massachusetts 02110

FOR: NEVD OF MASSACHUSETTS, LLC

Petitioner

Keefe B. Clemons, Esq.

New England Telephone & Telegraph Company, d/b/a

Bell Atlantic-Massachusetts

185 Franklin Street, Room 1403

Boston, Massachusetts 02110

FOR: NEW ENGLAND TELEPHONE and TELEGRAPH COMPANY, d/b/a
BELL ATLANTIC-MASSACHUSETTS

Respondent

I. INTRODUCTION

On September 23, 1999, New England Voice and Data of Massachusetts, LLC

("NEVD")⁽¹⁾ filed with the Department of Telecommunications and Energy ("Department") a complaint against New England Telephone and Telegraph Company, d/b/a Bell

Atlantic-Massachusetts ("Bell Atlantic-MA") pursuant to G.L. c. 166, § 25A ("Massachusetts Pole Attachment statute") and 220 C.M.R. §§ 45.00 et seq. ("Complaint"). The Complaint concerns NEVD's request to access to a conduit owned by Bell Atlantic-MA in Worcester, Massachusetts.

On October 7, 1999, Bell Atlantic-MA filed an answer to the allegations set forth in NEVD's Complaint ("Response"). The Department now, on its own motion, dismisses NEVD's Complaint for lack of jurisdiction.

II. POSITIONS OF THE PARTIES

A. NEVD Complaint

NEVD is a competitive local exchange carrier authorized to provide local exchange service in competition with Bell Atlantic-MA (Complaint at 1). On November

4, 1998, NEVD applied to Bell Atlantic-MA for a conduit license in the City of Worcester

(id. at 2). Thereafter, Bell Atlantic-MA furnished NEVD with a proposed conduit license agreement ("License Agreement") (id.). NEVD alleges that Bell Atlantic-MA refused to negotiate any changes to the language of the License Agreement to comply with the

nondiscriminatory access provisions of 47 U.S.C. §§ 151 et seq. ("Telecommunications Act of 1996"). Despite Bell Atlantic-MA's alleged failure to negotiate, NEVD argues it was compelled by "business exigencies" to sign the proposed License Agreement on January

5, 1999 (id. at 3).

Although the City of Worcester approved of NEVD's conduit request on April

29, 1999, NEVD argues that Bell Atlantic-MA did not complete the necessary manhole breakout work for conduit access until August 5, 1999 (id. at 8). NEVD alleges that the manhole breakout work required before NEVD could install its conduit was unreasonably delayed by seven weeks because Bell Atlantic-MA refused to permit NEVD or a qualified contractor to perform the work (id. at 7). NEVD asserts that Bell Atlantic-MA's actions relating to the manhole breakout work breached the License Agreement and constituted an unreasonable and discriminatory term, condition or practice (id. at 14).

NEVD claims that when it did finally install its fiber within Bell Atlantic-MA's conduit, NEVD was prohibited from splicing fiber at manhole zero and that Bell Atlantic-MA imposed an additional requirement for another license for fiber slack (id. at 8). NEVD also contends that Bell Atlantic-MA's refusal to pull its fiber to NEVD's cage amounted to an unreasonable and discriminatory attachment term, condition or practice and violated the License Agreement (id. at 14). NEVD maintains that Bell Atlantic-MA should establish performance standards to apply to all requests for conduits with refund provisions for failing to respond to timely requests (id.).

B. Bell Atlantic-MA Response

Bell Atlantic-MA argues that it has provided NEVD access to its conduit in a

nondiscriminatory manner consistent with its obligations under the Telecommunications Act of 1996 and the Massachusetts Pole Attachment statute (Response at 11). According to Bell Atlantic-MA, its License Agreement is a standard form with the same terms it offers to all other entities (id. at 2). Bell Atlantic-MA argues that it assisted NEVD in the installation of its conduit and that Bell Atlantic-MA's need to perform manhole breakout work before NEVD could install its cable and place its fiber is a requirement clearly identified in the License Agreement (id. at 5). In light of the fact that NEVD gained access to the manhole and conduit in question, Bell Atlantic-MA argues that NEVD has failed to articulate any support justifying its request for relief (id. at 11).

III. Analysis and Findings

The issue the Department must decide is whether the facts alleged in the Complaint, when read in the light most favorable to NEVD, are cognizable under the Massachusetts Pole Attachment statute.⁽²⁾ As an incumbent local exchange carrier and owner of conduits, Bell

Atlantic-MA is subject to the requirements of 47 U.S.C. 224 (the "Federal Pole Attachment statute").

In 1978, the U.S. Congress enacted Public Law 95-234, which directed the Federal Communications Commission ("FCC") to regulate the rates, terms and conditions of cable television system attachments to utility owned poles, ducts, conduits, and rights-of-way. 47 U.S.C. § 224(b). Although this statute was not intended to preempt state regulation in this area, 47 U.S.C. § 224(c), it still required the FCC to promulgate implementing regulations that it would apply in the absence of effective state regulation, 47 U.S.C. § 224(b). Later in 1978, the Massachusetts General Court similarly authorized the Department (then the Department of Public Utilities) to regulate pole attachments. G.L. c. 166, § 25A, as amended by St.1997,

c. 164, §§ 265, 266. The Department subsequently promulgated rules for rates, terms and conditions for cable television attachments codified at 220 C.M.R. §§ 45.00 et seq.

In the Telecommunications Act of 1996, Congress sought to allow and enable competition in local telephone and cable television markets by expanding the applicability of the Federal Pole Attachment statute to require utility companies, including local exchange carriers, to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). As a result, the FCC amended its pole attachment regulations to provide "complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and

rights-of-way on rates, terms, and conditions that are just and reasonable." 47 C.F.R.

§ 1.1401. As with rates, terms and conditions, states may regulate discriminatory access but only if they have effective rules and regulations. See 47 C.F.R. § 1.1414.

Although the Department regulates rates, terms and conditions for pole attachments, ducts and conduits, Cablevision of Boston Company, D.P.U./D.T.E. 97-82, at 7 (February

11, 1998),⁽³⁾ Massachusetts has not yet taken the requisite steps to exercise jurisdiction over discriminatory access claims. In order to assert jurisdiction in this area, the Department opened a rulemaking to establish complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits and rights-of-way.⁽⁴⁾ A final order promulgating such regulations awaits issuance.

In this matter NEVD argues that the License Agreement does not contain any provisions guaranteeing nondiscriminatory access as required under the Telecommunications Act of 1996 (Complaint at 2). As a consequence, NEVD argues that Bell Atlantic-MA's failure to include these terms is an "unreasonable and discriminatory" practice (*id.* at 3). While NEVD raises concerns about the License Agreement, the essence of NEVD's concerns involve the actual means by which NEVD would have access to a Bell Atlantic-MA conduit (*id.*). The Department determines, therefore, that the issues NEVD raises with respect to the License Agreement involve discriminatory access, as opposed to allegations involving, an unjust rate, term or condition of any attachment agreement. Similarly, with respect to NEVD's claims that Bell Atlantic-MA prohibited the splicing of fiber at manhole zero and that Bell Atlantic-MA refused to pull its fiber to NEVD's cage, the Department again finds that the allegations are related to access since NEVD's claims relate to the preparatory work necessary to enter the Bell Atlantic-MA conduit. NEVD's request for Bell Atlantic-MA to establish performance standards for conduit applications also pertains to access related issues.

Where a complaint raises matters not within the Department's regulatory authority, the Department lacks jurisdiction over the complaint. *See, West Stockbridge Water Company*, D.P.U. 91-143-A, at 3 (1995); *AT&T Communications, Inc.*, D.P.U. 87-AD-19, at 3 (1993). The facts alleged in the Complaint, when read in a light most favorable to NEVD, involve only issues of discriminatory access. Because the Department has not yet adopted the regulations necessary to investigate discriminatory access claims, NEVD's complaint does not fall within the Department's present jurisdiction and must be dismissed.⁽⁵⁾ When the Department has completed its rulemaking in D.T.E. 98-36 and has made effective rules and regulations governing discriminatory access, any party may file with the Department a complaint

concerning discriminatory access. Until such time, jurisdiction in this limited area remains with the FCC.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That NEVD's complaint is dismissed without prejudice for lack of jurisdiction.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr. Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Since the filing of this complaint, NEVD has changed its name to Conversent Communications of Massachusetts, LLC. (Correspondence from NEVD to the Department, November 8, 1999).
2. The Massachusetts Pole Attachment statute states, in pertinent part: "The department of telecommunications and energy shall have the authority to regulate the rates, terms and conditions applicable to attachments, and in so doing shall be authorized to consider and shall consider the interest of subscribers of cable television services as well as the interests of consumers of utility services; and upon its own motion or upon petition of any utility or licensee said department shall determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree." General Laws c. 166, § 25A.
3. The Department addressed a similar issue concerning lack of jurisdiction over claims involving discriminatory access when we limited the scope of our investigation in Cablevision of Boston Company, D.P.U./D.T.E. 97-82, at 7 (1998).
4. ⁴ Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way, D.T.E. 98-36 (December 9, 1998).
5. NEVD has itself characterized its complaint as involving allegedly "discriminatory" conduct on Bell Atlantic-MA's part (Complaint at 11).